UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

2010 MSPB 47

Docket No. CH-3443-08-0337-I-2

Curt L. Wheeler,

Appellant,

v.

Department of Defense,

Agency.

March 5, 2010

Curt L. Wheeler, Xenia, Ohio, pro se.

Cynthia Cummings, Esquire, Columbus, Ohio, for the agency.

BEFORE

Susan Tsui Grundmann, Chairman
Anne M. Wagner, Vice Chairman
Mary M. Rose, Member

OPINION AND ORDER

¶1 The appellant has petitioned for review of the initial decision (ID) that dismissed his appeal under the Veterans Employment Opportunities Act of 1998 (VEOA) for lack of jurisdiction. For the reasons discussed below, we GRANT the petition for review (PFR) under 5 C.F.R. § 1201.115(d) and AFFIRM the ID AS MODIFIED by this Opinion and Order.

BACKGROUND

¶2 The appellant, a preference eligible with a 30% service-connected disability, applied under Vacancy Announcement NS-0091-07 for the position of

Supervisory Accountant with the Defense Finance and Accounting Service (DFAS). *See* Initial Appeal File (IAF), Tab 14, Exhibit (Ex.) A at 1; *id.*, Ex. B at 1; *id.*, Ex. E at 1. On June 20, 2007, DFAS notified the appellant that his application was not referred to the selecting official. *Id.*, Ex. B at 1. The appellant contacted DFAS, asserting that his rights as a veteran had been violated. *See id.*, Ex. C at 1-2. On July 7, 2007, the appellant filed a complaint with the Department of Labor (DOL), claiming that DFAS violated his veterans' preference rights. *Id.*, Ex. F at 1. On September 20, 2007, DFAS advised the appellant that, because he is a 30% disabled veteran, it made an administrative error by failing to refer his application and that he would be given priority consideration for a similar job posting. *Id.*, Ex. D at 1-2. He was not selected for the similar position. *See* IAF, Tab 14 at 5. On December 11, 2007, DOL concluded that DFAS violated the appellant's rights by failing to refer him to the selecting official, and it indicated that the appropriate remedy for the violation was to reconstruct the selection process. *Id.*, Tab 14, Ex. E at 1-2. When DFAS did not reconstruct the selection process, DOL notified the appellant on January 18, 2008, that it was closing its investigation and was unable to resolve his complaint. *Id.*, Ex. F at 1.

¶3 The appellant filed a timely appeal with the Board. *See* IAF, Tab 1. In April 2008, while the appeal was pending, DFAS reconstructed the selection process, adding the appellant's name (as a 30% disabled veteran) to the list of candidates referred to the selecting official. IAF, Tab 14, Exs. G-H; Refiled Appeal File (RAF), Tab 8, Exs. A-B. As she had done before, the selecting official referred the list to a panel that rated and scored the candidates. RAF, Tab 8, Ex. F at 1. Based on the scores assigned to each candidate, the panel determined that the appellant would not have been on the list of eight candidates that the panel originally recommended to the selecting official. *Id.*, Exs. D, F.

The selecting official confirmed her original selection for the position.[*] *Id.*, Ex. E.

¶4 The administrative judge (AJ) dismissed the appeal for lack of jurisdiction. RAF, Tab 11, ID at 7. He recognized that, under VEOA, if an agency action is not directly appealable to the Board, the appellant must first show that he exhausted his remedy with DOL before he files an appeal with the Board. *Id.* at 5. The AJ found that the appellant's DOL complaint was based on DFAS's failure to refer his application to the selecting official and that while his appeal was pending DFAS reconstructed the selection process. *Id.* at 6. He thus found that the basis of the appeal was rendered moot and that, because the Board never ordered DFAS to reconstruct the selection process, the Board did not have the authority to review whether the selection process was properly reconstructed. *Id.* He further found that the refiled appeal concerned whether the agency violated a statute or regulation relating to veterans' preference in the manner in which it conducted the reconstructed selection process, but that the appellant failed to file a complaint with DOL alleging that DFAS committed such a violation when it reconstructed the hiring process. *Id.* at 6-7. Therefore, the AJ found that the appellant had not exhausted his remedy with DOL with respect to this allegation and that accordingly the Board lacked jurisdiction over his appeal with regard to DFAS's alleged violation of a statute or regulation relating to veterans' preference during the reconstructed selection process. *Id.* at 7.

¶5 The appellant has filed a timely PFR, Petition for Review File (PFRF), Tab 1, and the agency has filed a response in opposition, *id.*, Tab 3.

---

[*] In November 2008, the administrative judge dismissed the appeal without prejudice to the appellant's right to refile for six months in order to allow the appellant time to complete discovery. IAF, Tab 19. The appellant refiled his appeal on May 4, 2009. RAF, Tab 1.

ANALYSIS

¶6 Early in the proceedings, the parties seemed confused about whether the NS-0091-07 Supervisory Accountant position was filled via open competitive examination or merit promotion. *See* IAF, Tabs 8 & 9. This distinction is crucial, since the veterans' preference rules that must be followed in an open competitive examination do not apply to a merit promotion action. *Joseph v. Federal Trade Commission*, 103 M.S.P.R. 684, ¶¶ 12-13 (2006), *aff'd*, 505 F.3d 1380 (Fed. Cir. 2007); *Brandt v. Department of the Air Force*, 103 M.S.P.R. 671, ¶ 16 (2006). Later, however, the appellant filed evidence indicating that the agency filled the Supervisory Accountant position following merit promotion procedures, RAF, Tab 6 (Gomez deposition at 24-25), and the appellant argued in his final submission that the agency violated his right to compete under merit promotion procedures pursuant to 5 U.S.C. § 3304(f), RAF, Tab 10.

¶7 To establish VEOA jurisdiction over a right-to-compete claim, the appellant must show that he exhausted his remedy with DOL and make nonfrivolous allegations that he is a veteran described in 5 U.S.C. § 3304(f)(1), the agency denied him the right to compete under merit promotion procedures for a vacant position for which the agency accepted applications from outside its own workforce, and the denial occurred on or after December 10, 2004, the effective date of the relevant amendment to section 3304. *Styslinger v. Department of the Army*, 105 M.S.P.R. 223, ¶ 31 (2007). For an appellant to meet VEOA's requirement that he exhaust his remedy with DOL, he must establish that: (1) he filed a complaint with the Secretary of Labor; and (2) the Secretary of Labor was unable to resolve the complaint within 60 days or has issued a written notification that the Secretary's efforts have not resulted in resolution of the complaint. *Davis v. Department of Defense*, 105 M.S.P.R. 604, ¶ 7 (2007); *see* 5 U.S.C. § 3330a(d)(1) ("If the Secretary of Labor is unable to resolve a complaint under subsection (a) within 60 days after the date on which it is filed, the complainant may elect to appeal the alleged violation to the Merit Systems Protection

Board."). Further, an appellant need not state a claim upon which relief may be granted for the Board to have jurisdiction over a VEOA claim. *Cruz v. Department of Homeland Security*, 98 M.S.P.R. 492, ¶ 6 (2005).

¶8 Here, it is undisputed that the appellant is a preference eligible veteran with a 30% service-connected disability who is covered by section 3304(f), *see* IAF, Tab 14, Ex. E at 1, and that the nonselection at issue took place after December 10, 2004. We further find that the appellant has made nonfrivolous allegations that the agency violated the appellant's right to compete for the Supervisory Accountant position under 5 U.S.C. § 3304(f)(1) by failing to consider him for that position.

¶9 The Board has found that allegations of a VEOA violation should be liberally construed. *See Weed v. Social Security Administration*, 112 M.S.P.R. 323, ¶ 12 (2009). In cases of nonselection under VEOA, the Board typically determines whether an appellant has exhausted his remedy with DOL based on whether the appellant submitted a complaint to DOL asserting that the agency violated his rights in connection with a specific position or vacancy announcement. *See, e.g.*, *Roesel v. Peace Corps*, 111 M.S.P.R. 366, ¶ 16 (2009); *Gingery v. Department of the Treasury*, 110 M.S.P.R. 83, ¶ 16 (2008); *Heckman v. Department of the Interior*, 109 M.S.P.R. 133, ¶ 8 (2008), *overruled on other grounds by Garcia v. Department of Agriculture*, 110 M.S.P.R. 371 (2009). Because Board precedent requires that VEOA allegations be broadly construed and because the appellant filed a complaint with DOL essentially alleging that the agency violated his right to compete in connection with Vacancy Announcement NS-0091-07, we find that the appellant has exhausted his remedy with DOL. *See, e.g.*, *Weed*, 112 M.S.P.R. 323, ¶ 12; *Heckman*, 109 M.S.P.R. 133, ¶ 8.

¶10 The AJ, however, found that the appeal was rendered moot because the agency reconstructed the selection process and referred the appellant's application to the selecting official while his Board appeal was pending. ID at 6. The AJ also found that, because the Board never entered an order directing the

agency to reconstruct the selection process, the Board did not have jurisdiction to review whether the agency properly reconstructed the selection process. *Id.* On review, the appellant asserts that the agency agreed to reconstruct the selection process while his appeal was pending only to avoid an order instructing it to do so. PFRF, Tab 1 at 3. He further asserts that he is entitled to a lawful reconstruction and that his original appeal remains unresolved until then. *Id.* He argues that the reconstructed selection process was a "sham" and that an agency official admitted that the agency did not reconstruct the whole process. *Id.* at 3-4.

¶11 The mootness doctrine, which stems from the "case or controversy" requirement of Article III of the Constitution, is jurisdictional in nature. *See Nasatka v. Delta Scientific Corp.*, 58 F.3d 1578, 1580 (Fed. Cir. 1995). Although the Board is not an Article III court, it is governed by an analogous statutory provision that prohibits it from issuing advisory opinions. *See* 5 U.S.C. § 1204(h). A case is moot when the issues presented are no longer "live" or the parties lack a legally cognizable interest in the outcome of the case. *Powell v. McCormack*, 395 U.S. 486, 496 (1969); *Horner v. Merit Systems Protection Board*, 815 F.2d 668, 670-71 (Fed. Cir. 1987); *see Occhipinti v. Department of Justice*, 61 M.S.P.R. 504, 507 (1994). Mootness can arise at any stage of litigation, and an appeal will be dismissed as moot when, by virtue of an intervening event, the Board cannot grant any effectual relief whatever in favor of the appellant, *viz.*, when the appellant, by whatever means, obtained all of the relief he could have obtained had he prevailed before the Board, and thereby lost any legally cognizable interest in the outcome of the appeal. *See Calderon v. Moore*, 518 U.S. 149, 150 (1996); *Perisho v. U.S. Postal Service*, 69 M.S.P.R. 55, 58 (1995); *Gonzalez v. Department of Justice*, 68 M.S.P.R. 439, 441 (1995); *see also Gingery*, 110 M.S.P.R. 83, ¶ 17.

¶12 Put another way, once Board jurisdiction has attached, it cannot be extinguished based on mootness unless the appellant has received all of the

possible relief he sought before the Board, i.e., unless it is impossible for the Board to grant any further effectual relief. *See Nasatka*, 58 F.3d at 1580; *see also Dalton v. Department of Justice*, 66 M.S.P.R. 429, 434 (1995). The available remedy need not be "fully satisfactory" to avoid mootness: a partial remedy is sufficient. *Calderon*, 518 U.S. at 150. Thus, the availability of even a partial remedy is sufficient to prevent a case from being moot. *Id.*

¶13 In *Gingery*, the Board held that DOL's resolution of the appellant's complaint, based on the agency's agreement to provide him with a tentative employment offer if he passed a Telephone Assessment Program test, did not provide the appellant with all the relief that he could have received if his VEOA appeal had been adjudicated and he had prevailed before the Board. *Gingery*, 110 M.S.P.R. 83, ¶¶ 5-6, 17. It indicated that, under *Walker v. Department of the Army*, 104 M.S.P.R. 96, ¶ 18 (2006), the proper remedy under the VEOA for violation of the appellant's rights is the reconstruction of the selection process for the position consistent with law. *See Gingery*, 110 M.S.P.R. 83, ¶ 17. The AJ therefore erred in finding, without addressing the appellant's arguments regarding the accuracy of the reconstructed selection process, that the appellant's claim that the agency violated his rights had been rendered moot. *See* ID at 6.

¶14 Moreover, the Board has held that its jurisdiction is determined by the nature of an agency's action against a particular appellant at the time an appeal is filed with the Board. *See Himmel v. Department of Justice*, 6 M.S.P.R. 484, 486 (1981). An agency's unilateral modification of its adverse action after an appeal has been filed cannot divest the Board of jurisdiction unless the appellant consents to such divestiture, or unless the agency completely rescinds the action being appealed. *Id.* Here, at the time the appellant filed his appeal, he made a nonfrivolous allegation that the agency violated a statute or regulation relating to veterans' preference by denying his right to compete when it failed to submit his application to the selecting official. *See* IAF, Tab 14, Ex. D at 1. As we discussed above, the Board clearly had jurisdiction over this appeal at the time it

was filed. Accordingly, our finding that the AJ should have determined whether the appellant received all the relief he would have been provided if the Board had adjudicated his VEOA appeal and he had prevailed is consistent with the Board's holding in *Himmel* that jurisdiction is determined by the nature of the agency's action at the time an appeal is filed.

¶15 However, we find based on the written record, as the appellant did not request a hearing, that the appellant's assertion that the agency did not properly reconstruct the selection process is without merit. The appellant, relying on the declarations and the deposition testimony of the selecting official and the head of the selection panel, asserted that the agency did not fully reconstruct the hiring process and instead simply "panel[ed]" his resume. *See* RAF, Tab 6 at 3.

¶16 The agency submitted evidence demonstrating that during the reconstructed selection process the appellant's name was added to the referral list for Vacancy Announcement NS-0091-07 as a 30% disabled veteran. *See* RAF, Tab 8, Exs. A-B. It also submitted evidence that the appellant's application "was rated by the [selection] panel against the same criteria used to evaluate the other candidates." *See id.*, Ex. D. The selecting official stated in a sworn declaration that she requested that the original selection panel members reconvene to evaluate the appellant as part of the reconstructed selection process. *Id.*, Ex. F at 1. The head of the selection panel stated in a sworn declaration that the appellant's application was "evaluated by the same panel members and against the . . . [c]riteria" used in the original evaluation of candidates but that his name was not included on the list of candidates referred to the selecting official because his score was too low. *Id.*, Ex. G at 1. In his deposition testimony, the panel head did indicate that the selection panel had not "reconstructed the whole process" but rather "evaluated [the appellant's] resume" using the same criteria under which the other applicants were evaluated. RAF, Tab 6, Ex. O at 4-5. The evidence submitted demonstrates that the appellant's application was evaluated by the same individuals and under the same criteria as the original candidates.

The appellant failed to demonstrate that the agency was required to reconstruct each step of the selection process, including reevaluating and rescoring the other applications. Rather, the record establishes that the agency provided the appellant with the right to compete for the Supervisory Accountant position as required by 5 U.S.C. § 3304(f)(1), and thus the appellant's assertion on this issue is without merit.

¶17 The appellant also asserts that the agency's reconstructed selection process violated various merit system principles and constituted prohibited personnel practices because it awarded points based on previous performance ratings to internal candidates but not to external candidates. RAF, Tab 6 at 3, 6. He further asserts that by violating merit system principles and engaging in prohibited personnel practices, the agency did not reconstruct the selection process in accordance with the law. *Id.*, Tab 10 at 2. The panel head stated during his deposition that points based on previous performance ratings were assigned to any applicant who provided the relevant information. RAF, Tab 6, Ex. O at 3. He explained that the agency's Human Resources department provided the last two performance ratings for all internal candidates and that a fully successful rating was assumed for any external candidate who did not provide his two most recent performance ratings in the application. *Id.* at 4; *see* IAF, Tab 14, Ex. K. He further explained that no requirement was in place for the panel to solicit prior performance ratings from external candidates and that there had been no such practice established in past panels in which he participated. RAF, Tab 6, Ex. O at 4. Because the agency applied its scoring method consistently to all external candidates, regardless of veteran status, the appellant has failed to demonstrate that the agency's scoring method in the reconstructed hiring process violated his right to compete under 5 U.S.C. § 3304(f)(1). In this connection, the appellant, who bears the burden of proof on the merits of this appeal, *Dale v. Department of Veterans Affairs*, 102 M.S.P.R. 646, ¶ 10, *review dismissed*, 199 F. App'x 948

(Fed. Cir. 2006), has not shown that the agency failed to follow its own merit promotion procedures when it reconstructed the selection process.

¶18 Because the appellant's assertions that the agency violated his right to compete during the reconstructed hiring process are without merit, we find that the appellant has obtained all of the relief he could have obtained had he prevailed on his VEOA claim before the Board. *See Calderon*, 518 U.S. at 150; *Perisho*, 69 M.S.P.R. at 58. Accordingly, it is impossible for the Board to grant any further effectual relief. *See Nasatka*, 58 F.3d at 1580. The appeal is therefore moot. For this reason, we dismiss it for lack of jurisdiction.

ORDER

¶19 This is the final decision of the Merit Systems Protection Board in this appeal. Title 5 of the Code of Federal Regulations, section 1201.113(c) (5 C.F.R. § 1201.113(c)).

NOTICE TO THE APPELLANT REGARDING YOUR FURTHER REVIEW RIGHTS

You have the right to request the United States Court of Appeals for the Federal Circuit to review this final decision. You must submit your request to the court at the following address:

United States Court of Appeals
for the Federal Circuit
717 Madison Place, N.W.
Washington, DC 20439

The court must receive your request for review no later than 60 calendar days after your receipt of this order. If you have a representative in this case and your representative receives this order before you do, then you must file with the court no later than 60 calendar days after receipt by your representative. If you choose to file, be very careful to file on time. The court has held that normally it does not have the authority to waive this statutory deadline and that filings that do not

comply with the deadline must be dismissed. *See Pinat v. Office of Personnel Management*, 931 F.2d 1544 (Fed. Cir. 1991).

If you need further information about your right to appeal this decision to court, you should refer to the federal law that gives you this right. It is found in Title 5 of the United States Code, section 7703 (5 U.S.C. § 7703). You may read this law, as well as review the Board's regulations and other related material, at our website, http://www.mspb.gov. Additional information is available at the court's website, www.cafc.uscourts.gov. Of particular relevance is the court's "Guide for Pro Se Petitioners and Appellants," which is contained within the court's Rules of Practice, and Forms 5, 6, and 11.

FOR THE BOARD:

_____
William D. Spencer
Clerk of the Board
Washington, D.C.